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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 592

RONALD MAURICE STUMP,
Respondent,

vs.

JOHN E. BENNETT, Warden, Iowa State Penitentiary,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on June 27, 1968.

CITATION TO OPINIONS BELOW

The orders of the United States District Court are unreported and are printed in Appendix A hereto. The opinion of the United States Court of Appeals is reported in ..... F.2d ....., and is printed in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1968. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1)

QUESTION PRESENTED

Does a state have the constitutional right to require a defendant choosing the defense of alibi to accept a limited burden of proof apart from the constant burden on the state to prove guilt beyond a reasonable doubt in order to obtain a conviction?

CONSTITUTIONAL PROVISION

The constitutional provision involved is Amendment XIV, Sec. 1, Constitution of the United States: "No state shall make or enforce any law which will abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Respondent herein was charged with the June 9, 1961, slaying of one Michael Daly in Des Moines, Iowa. There was an eyewitness to the crime. Mr. Daly was with Miss Leanna Skultety in her car that evening when they stopped in front of the home of Daly's parents. Miss Skultety testified that another car had been following them. A man identified by Miss Skultety as the respondent got out of the other car. She and Daly got out of her car. Miss Skultety testified that she heard a noise, turned and saw the respondent shoot Daly; that Daly fell back toward the back of the car; that respondent walked closer,

stood over him and fired. The girl screamed, heard footsteps, heard and saw the other car go. An ambulance and the police were called and the alarm for the apprehension of the respondent was sounded. Michael Daly died a few hours later of a gunshot wound in his head.

The respondent was taken into custody by police at the home of a relative in Ottumwa, Iowa, on the next morning, June 10, 1961. He was employed in Des Moines at the time. At trial the respondent claimed that he had left Des Moines between 7:30 and 8 p.m. on June 9, which was before the shooting of Daly at about 8:30 p.m. The respondent alleged, by his testimony as well as others at the trial, that he was on the highway between Des Moines and Knoxville, Iowa, at the time of the offense. The defense was thus that which is commonly called "alibi."

At the conclusion of the evidence, the trial judge instructed the jury. One of the 25 Instructions placed on the defendant the burden of establishing the alibi by a preponderance or greater weight of the evidence bearing upon it. The judge clearly advised the jury that even if such defense was not established, a reasonable doubt was still sufficient to acquit (Appendix C, *infra*, p. A41).

The jury returned a verdict of second degree murder and on December 11, 1961, respondent was sentenced to seventy-five years in prison. His conviction was affirmed on appeal. *State* v. *Stump*, 254 Iowa 1181, 119 N.W.2d 210. On July 28, 1965, the respondent filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Iowa, alleging his confinement to be illegal. A hearing was held on this Petition and on October 26, 1965, the District Court entered an Order directing the respondent to seek further post-conviction relief in the state courts with respect to his claims arising out of the admission of his statements into evidence, for the reason

that he had failed to exhaust his state remedies regarding that contention. The court reserved jurisdiction to rule on the Petition after the state remedies were exhausted. On April 26, 1967, the court, through Chief Judge Stephenson entered its Order denying the Petition and holding that the appellant's constitutional rights had not been violated on any of the grounds alleged (D. Ct. Orders, October 26, 1965; April 26, 1967, Appendix A, *infra*, p. A1; p. A3).

On appeal to the United States Court of Appeals, the judgment of the Federal District Court was reversed and remanded with instructions set forth in the opinion. (Appendix B, *infra*, pp. A30-A31). Both the majority and dissent acknowledged the previous decision in *Johnson* v. *Bennett*, 386 F.2d 677 (8th Cir., 1967) but did not fully resolve the possible distinctions between the two decisions (Appendix B, *infra*, p. A29; p. A31).

REASONS FOR GRANTING THE WRIT

1. The ruling of the court below reversing the judgment appealed from and remanding for further proceedings conflicts with the rulings of this court as well as a previous decision of the same Court of Appeals. The court below concluded that the wide berth granted to the states by the due process clause to develop rules of procedure and evidence did not extend to the Iowa alibi instruction. Instead, the court found that this particular instruction, in spite of all other instructions, so offended the respondent's right to presumption of innocence that federal intervention was justified. This proposition does not conform to the decisions of this Court in *Leland* v. *Oregon*, 343 U.S. 790, and *United States* v. *Gainey*, 380 U.S. 63. The holding is also contrary to the earlier decision of the Court of Appeals in *Johnson* v. *Bennett*, 386 F.2d 677 (8th Cir., 1967), which is now before this Court on certiorari. (No. 1131).

This court as well as others, has recognized that jury instructions should be considered as a whole and not in isolation from one another. This Court has accepted that principle as governing where a violation of constitutional right is asserted. *United States* v. *Gainey*, 380 U.S. 63, 70-71. One of the dissenting Judges below noted that the jury was informed on at least twelve different occasions by the trial court that it was required to find the defendant guilty, if at all, beyond a reasonable doubt. *Stump* v. *Bennett*, ... F.2d ..... (Appendix B, *infra*, p. A41).

In *Leland* v. *Oregon*, 343 U.S. 790, this Court found no constitutional error in an instruction requiring a defendant to prove his defense of insanity beyond a reasonable doubt.

Not only does the decision below conflict with these important precedents, but it raises a significant doubt as to where the law stands on the alibi instruction issue. The Iowa Supreme Court has repeatedly held that the alibi instruction is both justifiable and constitutional. *State* v. *Johnson*, 221 Iowa 8, 264 N.W. 596; 267 N.W. 91; *State* v. *Stump*, 254 Iowa 1181, 119 N.W.2d 210. The Court of Appeals for the Eighth Circuit recently found the traditional Iowa alibi instruction to be of questionable wisdom but refused to declare it unconstitutional. *Johnson* v. *Bennett*, 386 F.2d 677.[1] Now the Court of Appeals has held that the alibi instruction is both unwise and in violation of a defendant's constitutional right to due process. *Stump* v. *Bennett*, ... F.2d ..... (Appendix B, *infra*, p. A29). The dilemma posed to the Iowa courts is clear. Settlement of this problem would appear to be in the best interest of the administration of criminal justice for both the State of Iowa and the Eighth Federal Judicial Circuit.

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1. The full text of the alibi instruction approved in that decision is printed in Appendix C, *infra*, at pp. A42-A43.

The possible confusion which could result from impending decisions on this issue amplifies the need for this Court's consideration of the decision below. Should the United States Supreme Court affirm the Court of Appeals in *Johnson* v. *Bennett*, No. 1131, then what will be the status of the Circuit Court decision in *Stump* v. *Bennett*? If *Johnson* v. *Bennett* is overruled on the alibi point, will the new rule be applied retrospectively to the respondent's 1961 trial? Will the decision affect the most recent challenge to the alibi instruction before the Iowa Supreme Court? (*State* v. *Carter*, No. 53626, submitted September 20, 1968.) Because only this Court can settle the confusion created by divergent positions in the State and Federal courts by reason of the above cases, it is respectfully submitted that the decision below be given equal consideration with the case of *Johnson* v. *Bennett* now before this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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